(1) 85-1842

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1985

_____

No.

_____

DAN COVERT,

Petitioner

v.

COMMONWEALTH OF KENTUCKY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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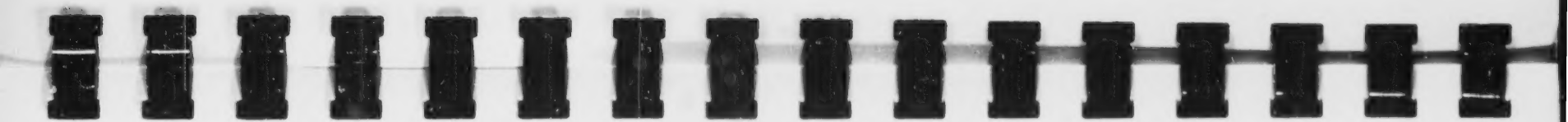
May 1986

40 pp



QUESTION PRESENTED

Whether the trial judge violated the petitioner's rights under the Sixth Amendment Confrontation Clause when, in a rape trial where consent was at issue, he excluded evidence of prior sexual relations between the petitioner and one of the alleged rape victims?

LIST OF PARTIES

Dan Covert

Commonwealth of Kentucky

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

DAN COVERT,

Petitioner

vs.

COMMONWEALTH OF KENTUCKY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky, entered in the above entitled case on October 31, 1985.

OPINION BELOW

The opinion of the Supreme Court of Kentucky is unreported. It is reprinted in the Appendix. (A-2).

JURISDICTION

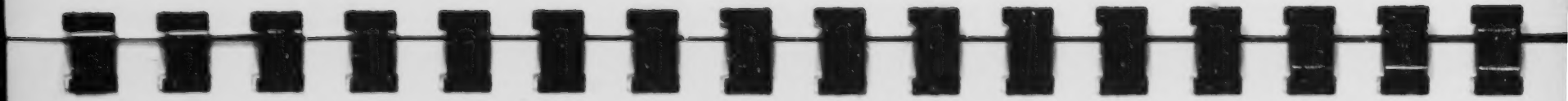
The judgment of the Supreme Court of Kentucky was entered on October 31, 1985. Rehearing was denied on February 6, 1986. (A-1) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 510.145, Kentucky Penal Code (Supp. 1984):

510.145 Inadmissibility of evidence of prior sexual conduct or habits of complaining witness; exception; procedure for admission

(1) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject



to the provisions of this section.

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2) of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based, may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit; stating that the defendant has an offer of relevant evidence of prior sexual

conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that it's probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence.

AMENDMENT VI

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit-

nesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE

The petitioner, Dan Covert, was convicted of various sex offenses under Kentucky law, including rape in the first degree, rape in the third degree and sodomy in the third degree.[1] The trial judge sentenced him to 25 years incarceration[2] and $3,750 in fines. Petitioner's appeal to the Supreme Court of Kentucky failed.

In connection with one of the rape charges, petitioner alleged prior sexual activity between himself and a complaining witness, Donna Wheeler. On August 16, 1984, the trial court held a hearing in chambers pursuant to the Kentucky Rape Shield Statute to determine the admissibility of this evidence. The hearing was triggered by the defendant's motion to

---

[1] In addition to these convictions, petitioner was also convicted on five sexual misconduct counts, one count of sexual abuse in the third degree and five counts of solicitation to prostitution. (A-5)

[2] Petitioner's sentences for the two rape and the sodomy convictions were fifteen, five and five years respectively. The judge ordered that they be served consecutively. (A-10)

permit him to examine and produce evidence of "prior sexual conduct or habits of the . . . complaining witness." (A-12) Procedural requirements to produce such evidence were at all times appropriately followed, as the trial court observed that defendant Covert moved "in compliance with KRS 510.145."

Counsel for the defendant indicated that the motion was filed because the defendant insisted that he had known Ms. Wheeler for "quite some time" prior to the indictment and that they had sexual intercourse previous to the alleged rape. In support of that, he further alleged that Ms. Wheeler had advised him of her sexual preferences as to how she wished to have sex conducted with her. It was claimed that her preferences had been developed and expressed in sexual relations with others. The defendant Covert claimed he had sexual relations with complainant on that basis. He further claimed that sexual intercourse between the two took place in <u>his</u> apartment.

In response to the defense counsel's motion to examine and admit evidence of prior

sexual intercourse, the court ruled, in pertinent part, as follows:

> "[A]ny evidence as to her [Donna Wheeler's] prior sexual conduct with the defendant prior to that date [of the alleged rape] . . . under the Rape Shield Law is not admissible." (A-20)

REASONS FOR GRANTING THE WRIT

Discussion of the topics of consent and adequacy of evidence in sexual misconduct cases constituted a significant portion of the petitioner's brief to the Supreme Court of Kentucky. The court below gave limited attention in its opinion to petitioner's argument. The Supreme Court of Kentucky resolved the evidentiary issue in one paragraph of a summary opinion. (A-2) Before the trial court, petitioner gave extensive treatment to the consent issue. In Kentucky the issue of consent is governed by the state's rape shield statute. Realizing this, the petitioner, concerned with bringing this question properly before the court, meticulously followed the

procedure mandated by law. (A-12) The trial judge noted the petitioner's careful compliance with the rape shield statute at the hearing on defendant's motion to cross-examine and present evidence. A hearing was held to determine the admissibility of evidence of the complaining witness' prior sexual relations with the petitioner. The court denied the admission of this evidence. In so doing, the trial court placed itself directly in opposition to the acknowledged exception to shield law protection, that a victim's prior sexual behavior with the accused is admissible.

Rule 412 of the Federal Rules of Evidence provides for this exception. Not content to leave the federal rule in the general posture of mandating admission of evidence of a victim's past sexual behavior when such evidence "is constitutionally required," Rule 412(b)(2)(A) spells out a specific circumstance which triggers application of the constitutional command -- evidence of past sexual behavior with the accused, when offered on

the issue of consent. Numerous state adaptations of Rule 412 have embraced the exception to the general exclusionary principle regarding past sexual conduct.[3] Other jurisdictions have incorporated a similar provision, even though they may have enacted a statutory pattern different from Rule 412.[4]

Courtroom practice in sexual assault prosecutions must, of course, comport with constitutional norms and requirements. An Oregon shield law, in its pre-1977 form, was held unconstitutional as applied because it did not allow the defendant an opportunity to adequately

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[3] E.g., Hawaii Rules of Evidence, Rule 412 (1980); Iowa Rules of Evidence, Rule 412 (1983).

[4] E.g., Rule 412, N.H. Rules of Evidence (1985); Rule 412, N.C. Rules of Evidence (1984). See Ga. Code Ann. §24-2-3(b). See also Tanford & Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544, 586 (1980); Comment, 49 U. Cinn. L. Rev. 244 (1980); Note, 67 Marq. L. Rev. 396 (1984); Comment, 53 U.M.K.C. L. Rev. 273 (1985).

confront complaining witnesses.[5] A 1982 Minnesota case observes that certain categories of past sexual conduct must be admissible in order to obviate due process and confrontation problems.[6] It seems undisputed here that the petitioner did not have the opportunity to confront the complaining witness on the issue of her prior sexual relations with the petitioner.

Although there are jurisdictional variations in language, the general pattern of shield legislation is to broadly bar reputation, opinion and specific acts evidence relating to the victim's past sexual behavior.[7]

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[5] State v. Jalo, 557 P.2d 1359 (Or. App. 1976), citing Davis v. Alaska, 415 U.S. 308 (1974). In Jalo, the prior conduct was offered to show the complainant had a motive to falsely accuse the defendant.

[6] State v. Caswell, 320 N.W.2d 417 (Minn. 1982) (evidence that complainant falsely accused former boyfriend of rape was improperly excluded, but error was harmless in this case).

[7] As a rule of Constitutional interpretation, the Supreme Court has suggested that uniform practice in a large number of states provides a key to determining fundamental fairness. Mapp v. Ohio, 367 U.S. 643, 651-53 (1961). See Griffin v. California, 380 U.S. 609, 611 n. 3 (1965). On the uniform practice of state

The rule of exclusion is then subject to exceptions for specific acts evidence relating to (1) alternative sources of semen, or (2) acts with the accused when consent is at issue. The refusal of evidence under the latter exception is error, a point well stated by Michigan Supreme Court Judge Kaufman in his opinion in People v. Williams:[8]

> In the case at bar, the defendants, on the issue of the complainant's consent, sought to introduce evidence that the complainant was a common prostitute and that she had had previous sexual conduct with one of the codefendants. Both attempts were denied by the trial court.
>
> . . .
>
> The evidence which the defendants sought to introduce with respect to the complainant's prior sexual activity with codefendant Williams could raise a

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in rape cases which is to allow evidence of complainant-defendant conduct, see supra notes 1 and 2, and infra notes 10 and 11 and accompanying text.

[8] 289 N.W.2d 863 (Mich. 1980).

reasonable doubt in the mind of a juror.

. . .

When evidence of specific instances of sexual conduct between a complainant and a codefendant is presented, the requirement for a hearing on the evidence lacks validity. The very nature of this evidence is personal between the parties. As such, a hearing upon its admissibility would necessarily break down into a consideration of the complainant's word against the defendant's word. Such a credibility assessment is better placed before the jury. The trial court usurps their role as a factfinding body when it preliminarily reviews and denies admission of this evidence through exercise of its discretionary powers. The hearing requirement retains its constitutional validity only in situations involving previous sexual conduct between a complainant and third persons.

. . .

Thus, we conclude that evidence of the complainant's previous sexual contacts with co-defendant

> Williams should have been admitted on the issue of consent. Codefendant Williams had the right to present this evidence in his own defense.[9]

Because of the acknowledged materiality of the evidence, the Williams court suggests that a hearing to test the admissibility of complainant-defendant conduct is unnecessary, when consent is at issue. Here, not only was a hearing held to determine the admissibility of this conduct, the evidence was denied admission even though it went directly to the issue of consent.

The Supreme Judicial Court of Massachusetts found great relevance in the sort of evidence analyzed here. Tracing the history of the rule to precedents dating back to the 1870s, the court in Commonwealth v. Greico concluded:

> We are of the view that the defendant, on the facts of this case, suffered prejudice as a result of the judge's interpretation of the rape-shield statute. A pattern of

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[9] Id. at 865-867. See also State v. Gavigan, 330 N.W.2d 571 (Wis. 1983).

> recent consensual sexual activity between the complainant and the defendant is relevant on the issue of consent, a fundamental issue in determining guilt.[10]

The petitioner here was victimized by the trial court's decision not to admit evidence of prior sexual relations between the complainant and the petitioner. As a result, the petitioner's guilt was determined by the jury without the best evidence on the most fundamental issue, consent.

One set of tables comparing forty-six rape victim shield statutes demonstrates the near-unanimous endorsement of an exception to exclusionary practice for conduct by the complainant with the accused.[11] It may safely be concluded that this type of evidence is the most widely recognized exception in the pattern of shield statutes. As one commentary

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[10] 386 Mass. 484, 436 N.E.2d 167 (1982) (common law rule as well as view of commentators). See United States v. Kasto, 584 F.2d 268 (8th Cir. 1978); Thomas v. State, 217 S.E.2d 152 (Ga. 1975); Annot., 94 A.L.R.3d 257, 284.

[11] Tanford, supra note 2 at 591-602.

summarized the situation: "The rape evidence laws universally allow the defendant who claims consent as a defense to show that he and the complainant had a prior consensual sexual relationship."[12] Another observes: "Most statutes admit evidence of the prosecutrix's prior sexual relations with the defendant, either automatically or upon a showing of materiality. Beyond this provision, however, no uniformity exists among the state statutes."[13] (emphasis added)

None of the foregoing affects the conclusion that previous sexual conduct between a rape case complainant and third parties will usually be excluded. Rather, it addresses judicial pronouncements concerning the central relevance of cross-examination of the complainant regarding her sexual conduct with the accused, as well as affirmative evidence of same. Denial and exclusion of such evidence

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[12] Id. at 553.

[13] Note, 27 Wash. U.J. of Urban & C. Law 271, 278 (1984).

violates the balancing test of Davis v. Alaska[14] and the right to present exculpatory proof announced in Chambers v. Mississippi.[15]

CONCLUSION

The trial court's ruling that evidence of the complaining witness' prior sexual relations with the petitioner was not admissible greatly prejudiced the petitioner's case. This evidence, as the court in Greico pointed out, is highly probative on the issue of consent which is fundamental in determining guilt.[16] Here,

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[14] 415 U.S. 308 (1974) (tension between right of confrontation and state policy of protecting witnesses; state's policy must yield to vital constitutional right of effective cross-examination).

[15] 410 U.S. 284 (1973) (refusal to permit defendant to call witnesses; exclusion of critical evidence, coupled with the State's refusal to permit defendant to cross-examine an important witness, denied a trial in accord with fundamental standards of due process).

[16] Note 8, supra.

petitioner was not allowed to present this probative evidence to the trier of fact. Consequently, the jury rendered a verdict of guilty based upon an incomplete record.

An historical, traditional and ingrained feature of the law of evidence allows cross-examination and proof disclosing prior complainant-defendant sexual relations.[17] When such cross-examination and proof is not allowed, prejudicial constitutional error results. As a rule of constitutional interpretation, the Supreme Court has suggested that uniform practice in a large number of states provides a key to determining fundamental fairness.[18] The fact that the admission of prior sexual conduct between a complaining witness and the defendant is the uniform practice in virtually every jurisdiction indicates that the petitioner was denied a fair trial[19]

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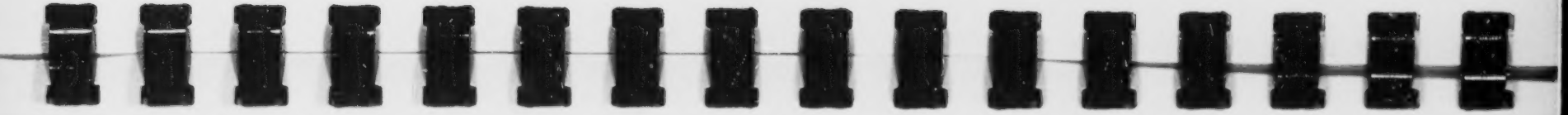
[17] Id.

[18] Supra, note 5.

[19] Note 13, supra.



and that his constitutional protections[20] were violated.

Petitioner thus does not seek to disrupt the national pattern of rape shield legislation. Rather, his request for review is compatible with such laws, as he seeks to insure that they are administered in a manner consistent with the Sixth Amendment's guaranteed rights to present evidence and to effectively confront adverse witnesses.

For the reasons stated herein, petitioner respectfully prays this petition for a Writ of Certiorari be granted.

Respectfully submitted,

Albert M. Pearson, III

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COUNSEL FOR PETITIONER

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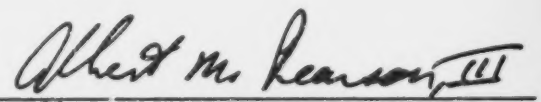
[20] Note 12, supra (right of confrontation).

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I hereby certify that on this 6th day of May 1986, three copies of the foregoing PETITION FOR WRIT OF CERTIORARI were mailed first-class postage pre-paid to:

David Armstrong, Attorney General
Carl T. Miller, Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494



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APPENDIX

Feb. 21, 1986

SUPREME COURT OF KENTUCKY

85-SC-37-MR

APPEAL FROM FAYETTE CIRCUIT COURT
#84-CR-033
HON. L. T. GRANT, JUDGE

DAN COVERT,

Appellant

v.

COMMONWEALTH OF KENTUCKY,

Appellee

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied. Stephens, C.J., not sitting.

ENTERED February 6, 1986.

/s/
Deputy Chief Justice

October 31, 1985

SUPREME COURT OF KENTUCKY

85-SC-37-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE N. MITCHELL MEADE, JUDGE
84-CR-033

DAN COVERT APPELLANT

V.

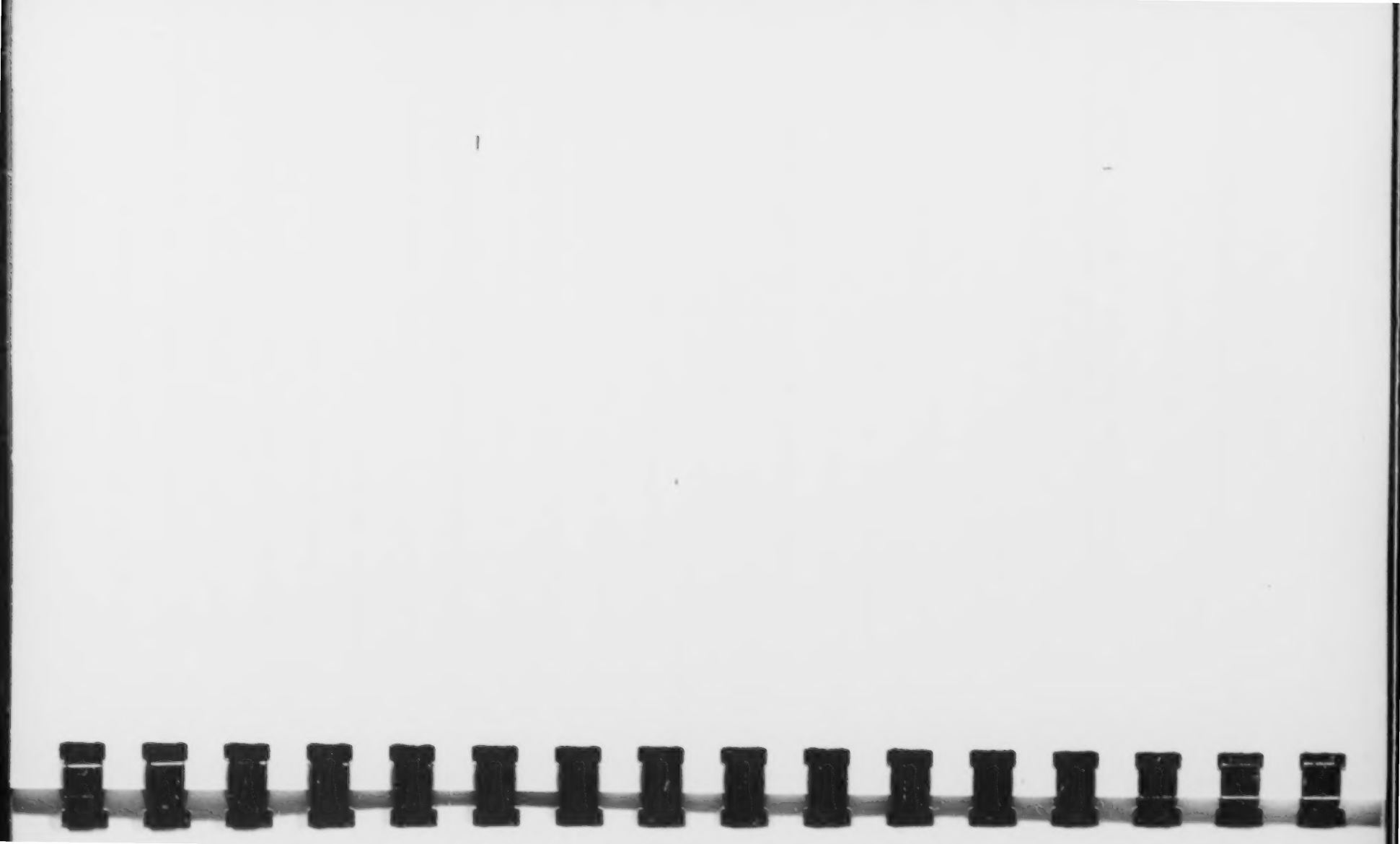
COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Dan Covert was convicted of first-degree rape and eight other felony counts and eighteen misdemeanor counts. The other counts involved sexual misconduct, accomplice to sexual misconduct, third-degree rape, third-degree sodomy, soliciting prostitution, third-degree sexual abuse, accomplice to third-degree sexual abuse, and possession of marijuana. Covert was sentenced to a total of twenty-five years in the penitentiary and fined $4,000.

Covert first asserts he was entitled to a directed verdict on the charge of first-degree



rape. We have reviewed the evidence and are of the opinion a jury issue was presented. The victim testified she was afraid Covert was going to hurt her and thus submitted. Covert did not testify. Based upon all the testimony, we conclude that the trial court did not err in submitting the case to the jury.

Next, Covert asserts error in that the trial court declined to grant separate trials on each of the charges. RCr 9.16, which provides for joinder of charges, requires a showing of unfair prejudice in order to justify a severance. Here, Covert did not make a showing as to how he was prejudiced or that the trial court abused his discretion. The charges all occurred over a brief period of time and in a pattern of conduct which would justify joinder.

Next, Covert asserts that one of the victims, acting as an agent of the Commonwealth, took a suitcase from his apartment, thereby gaining evidence for the Commonwealth. After a suppression hearing, the trial court found

that the Commonwealth did not solicit or authorize this action. We are of the opinion no reversible error has been shown in this ruling.

The other assertions of error either do not merit comment or were not preserved for appellate review or both.

The judgment is affirmed.

Aker, Gant, Leibson, Stephenson, and Vance, and Wintersheimer, JJ., concur.

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FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
FOURTH DIVISION

Sept. 19, 1984

FINAL JUDGMENT
SENTENCE OF IMPRISONMENT

No. 83CR-568
84CR-21
84CR-33

COMMONWEALTH OF KENTUCKY PLAINTIFF

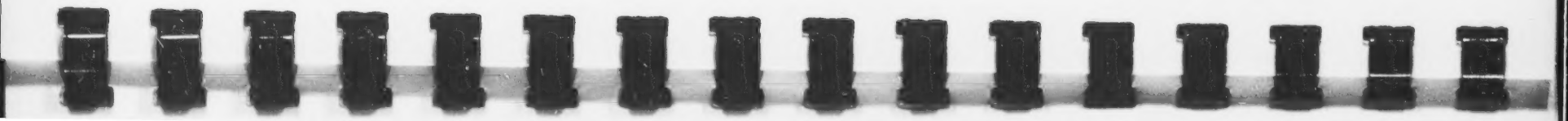
VS:

DAN COVERT DEFENDANT

CHARGE: Ct. 1: Rape 1st Degree; Cts. 2,4: Sexual Misconduct; Ct. 10: Rape 3rd Degree; Cts. 3,5: Sexual Misconduct; Ct. 6: Accomplice to Sexual Misconduct; Ct. 11: sodomy 3rd Degree; Ct. 7: Accomplice to Sexual Abuse 3rd Degree; Ct. 15: Possession of Marijuana; Cts. 16, 17,21,27 and 30: Solicitation, to wit: Prostitution

* * * * * * * * * * * * *

The defendant having entered a plea of not guilty, and on the 21st day of August, 1984, a jury having returned a verdict that the defendant was guilty of the crime of Ct. 1 -- Rape 1st Degree, Cts. 2,4 -- Sexual Misconduct, Ct. 10 -- Rape 3rd Degree, Cts. 3,5 -- Sexual



Misconduct, Ct. 6 -- Accomplice to Sexual Misconduct, Ct. 11 -- Sodomy 3rd Degree, Ct. 7 -- Accomplice to Sexual Abuse 3rd Degree, Ct. 15 -- Possession of Marijuana, Cts. 16, 17,21,27 and 30 -- Solicitation, to wit: Prostitution and fixed his punishment at fifteen (15) years on Ct. 1; twelve (12) months and a fine of $500.00 on each Ct. 2 and 4; five (5) years on Ct. 10; twelve (12) months and a fine of $500.00 on each Ct. 3 and 5; ninety (90) days and $250.00 fine on Ct. 6; five (5) years on Ct. 11; ninety (90) days and $250.00 fine on Ct. 7; no sentence was fixed on Ct. 15 and ninety (90) days and $250.00 fine on each Ct. 16,17,21,27 and 30.

On this 14th day of September, 1984, the defendant, Dan Covert, appeared in open Court with his attorneys, Hon. Margaret Kannensohn, Hon. John Turner and Hon. Lowell Lundy. Mrs. Lisa Pullium, the official court reporter of this Court, recorded the testimony and proceedings of this hearing and the Court inquired of the defendant and his counsel whether

they had any legal cause to show why judgment should not be pronounced, and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the Court informed the defendant and his counsel of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole, and the Court having given due consideration to the report prepared by the Division of Probation and Parole, and the defendant having been given time within which to controvert the factual contents and conclusions contained in said report, and the Court having given due consideration to the nature and circumstances of the crime, and to the history, character and condition of the defendant, and the Court having considered a sentence of probation and a sentence of conditional discharge is of the opinion that imprisonment is necessary for the protection of the public because there

is a substantial risk that the defendant will commit another crime during any period of probation or conditional discharge; probation or conditional discharge would unduly depreciate the seriousness of the defendant's crime; due to the defendant's prior criminal record; due to the defendant's failure to benefit from previous probation or parole and due to the serious nature of the defendant's crime.

No sufficient cause was shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant, and it is therefore ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the crime of Ct. 1 -- Rape 1st Degree, Cts. 2,4 -- Sexual Misconduct, Ct. 10 -- Rape 3rd Degree, Cts. 3, 5 -- Sexual Misconduct, Ct. 6 -- Accomplice to Sexual Misconduct, Ct. 11 -- Sodomy 3rd Degree, Ct. 7 -- Accomplice to Sexual Abuse 3rd Degree, Ct. 15 -- Possession of Marijuana, Cts. 16,17,21,27 and 30 -- Solicitation, to wit: Prostitution and his

sentence is hereby fixed at a maximum term of fifteen (15) years on Ct. 1; twelve (12) months and $500.00 fine on each Ct. 2 and 4; five (5) years on Ct. 10; twelve (12) months and $500.00 fine on each Ct. 3 and 5; ninety (90) days and $250.00 fine on Ct. 6; five (5) years on Ct. 11; ninety (90) days and $250.00 fine on Ct. 7; $250.00 fine on Ct. 15 and ninety (90) days and a fine of $250.00 on each Ct. 16,17,21,27 and 30 in the State Penitentiary at hard labor; and

It is further ORDERED AND ADJUDGED BY THE COURT that the Sheriff of Fayette County shall deliver the defendant to Department of Corrections hereunder at such location within this State as the Department shall designate.

IT IS FURTHER ORDERED that the defendant is hereby credited with time spent in custody prior to the commencement of sentence, namely, 46 days, towards service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he has a right to

appeal to the Court of appeals of Kentucky with the assistance of counsel, that if he were financially unable to afford such appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him that an appeal must be taken within ten (10) days of the date of this judgment and that the Clerk of the Court would prepare and file a notice of appeal on his behalf within that time if he so requests. Pending appeal the defendant is remanded to custody and his appeal bond is set at $100,000.00 (full cash).

It is further ORDERED BY THE COURT that the defendant shall pay Circuit Court a crime victim's compensation fee of $10.00

It is further ORDERED that the sentences imposed under Cts. 1,10 and 11 shall run consecutively with each other; that the sentences imposed under Cts. 2,3,4,5,6,7,16,17,21,27 and 30 shall run concurrently with each other and concurrently with Cts. 1,10 and 11, for a total sentence of twenty-five (25) years,

which shall run consecutively with any other sentence the defendant must serve.

/s/
JUDGE, FAYETTE CIRCUIT COURT

Kentucky
Fayette Circuit Court
Criminal Branch
Fourth Division
Transcript of Evidence and Proceedings
Trial, August 16, 1984

Pages 57-64

WHEREUPON the following took place in chambers outside the presence of the jury:

THE COURT: Let the record show that the Commonwealth announced to the Court that the next witness to be called would be Donna Wheeler. Let the record further show that prior to the trial in compliance with KRS 510.145 counsel for the defendant Covert filed a motion with the court to permit the defendant Covert to introduce evidence and to offer evidence of the prior sexual conduct or habits of the next witness and complaining witness, Donna Wheeler. And prior to the calling of Miss Wheeler to the witness stand, the Court and counsel retired to chambers pursuant to KRS 510.145(3)(b) to conduct a hearing and that's where we are.

MR. TURNER: If Your Honor please, Mr. Lundy will be doing the examination of Mrs. Wheeler on the direct to the jury. This is the motion which I filed, Your Honor, after Mrs. Kannensohn and I had discussed the matter because our client insists that he had known Donna Wheeler for quite some time prior to the date, as I recall in the indictment, of the 28th, that he had known her quite some time before that time and that they had had sexual intercourse previously. He also advises me that during the course of his being acquainted with Miss Wheeler, that she advised him of her sexual preferences as to how she wished to have sex conducted with her and as to her relationship with at least three other people, I believe. One as to when she had lost her virginity, and the other as to two members of the University of Kentucky basketball team that she had dated and with whom she had had sexual relations and the -- the essence of her statements to him regarding her having dated two members of the

basketball team, one being Derrick Hoard and the other Tom Heights, and the nature of the relationship, sexual relationship which existed between she and two gentlemen. And that when Mr. Covert and Miss Wheeler started having sexual relations it was based upon the same type or same course of conductivity. And during the time that she was coming to see him, it was to his apartment and that at no time did he force her to do anything or did he induce any foreign substance into her body which caused her to consent or to engage with him in the activities that were involved. On one of the occasions at which time Miss Wheeler was at the apartment of Mr. Covert we would like to cross-examine her and to present in his testimony, if he does testify, evidence to the effect that Donna Wheeler was in his apartment, they had been drinking; and evidently both of them got pretty drunk. She got -- excuse me -- sick, drunk and puked all over the place starting upstairs.

MR. GUTHRIE: Vomit.

MR. TURNER: He said puked and worked her way downstairs to bathroom area where Miss Wheeler proceeded to remove her clothes, I think, his testimony will be that he was assisting her somewhat in that. She then was puking, vomiting, regurgitating in the bathroom, in the commode I think his testimony will be. And he had taken her clothes across the street to a laundromat that was available to the patrons of the apartment complex at which he was residing, and he had proceeded to wash those items. I don't know exactly what they were. Anyhow, after he had washed those items, and was coming back to his apartment, he was joined by two uniform police officers. And those officers reported to him that they were there to investigate a complaint that he had a female in his apartment that was being held against her will or some such as that was being done. The two police officers came into his apartment with him and, of course, he was showing them her clothes and he'd been washing them and all the other

things that he ways, but anyhow, took them into the apartment and down the stairs or partially down the stairs, and at that time they were able to converse with Miss Wheeler regarding whether or not she was being held against her will. And that she then proceeded to get into Mr. Covert's bed. I don't know which one, but anyhow, that she stayed there until sometime the next morning, sometime after 4 or 5, 6:00, something like that, before she I guess recuperated enough to -- so that she and he engaged in sexual activity at that time. And that on, I believe he says, at least one other occasion she returned to the apartment and that they again engaged in sexual activity.

MR. LUNDY: And that on that occasion it would be our position, Judge, that she wanted him to give her an $85,000, Ferrari, plus $10,000 and he said something to the effect, well that's a lot of money for just doing it one time so he said they engaged in activity again.

MR. TURNER: In fact, she came back, we believe, the third time and that she was still going to make arrangements to get a new automobile Ferrari or money or both, and that we believe was the occasion of the 28, which she claims at the time she was raped and sodomized. And --

MR. LUNDY: Judge, bear in mind that in this case the evidence will be that she's got the date set forth in the indictment which she was allegedly raped wasn't reported for several days afterwards.

MR. TURNER: In fact she was allegedly raped --

THE COURT: That's admissible.

MR. LUNDY: I know that. I mean it's -- it's --

THE COURT: I would say that any sexual activity she had with the defendant on the day of the indictment is admissible, any transactions they had regarding sex which you said this Ferrari and all that stuff came in.

MR. TURNER: Judge, could I say one other thing?

THE COURT: Yes, sir.

MR. TURNER: Her roommate happens to be Patricia Crutcher. Patricia Crutcher answered the phone on the morning of August the 8th, we believe, when Mr. Covert was attempting to contact Mrs. -- Miss Wheeler. And Miss Wheeler was gone for -- well, she was really in the apartment, but Miss Crutcher thought she was gone, said she thought she was gone, and the testimony will be that we think that she got interested in coming over and finding out about that car and money and $885,000. And then on August the 8th I believe, Miss Crutcher decided she would report her rape; on August 10th her roommate Donna Wheeler decided she would report.

THE COURT: Well, all that's admissible. I mean there's nothing about her prior sexual activity there.

MR. LUNDY: Well, it is to this extent, Judge, that about our evidence our man had intercourse with her, you know, like the day, a week later and then, you know, two weeks later.

THE COURT: Well let's hear the response from the Commonwealth.

MR. BOUVIEW: Your Honor, only that the exception to Rape Shield law don't say the defendant has -- is permitted to introduce any evidence of prior sexual activity between the two of them any time and any place. They have to make a special showing of the relevance of it to this particular act so I would agree to the Court that if it involves this particular day, sure. But if we're simply going to start making allegations about her having prior sexual activity with Mr. Covert, you can do that in any case and there's nothing special that would make it relevant in order to trigger the exception of the statute. And there clearly would be nothing, UK football players and stuff.

MR. LUNDY: Judge, they've established a course of conduct that militates directly against our client that she's been raped.

THE COURT: If we follow your alls suggestion, you might as well abolish this

statute repeatedly. I'll rule this way, I'll permit you to introduce any sexual activity that the witness has with Mr. Covert on the day that she's alleged that she was raped, and also you can introduce evidence when she reported it, she lived with Patricia Crutcher and all that stuff. But any evidence as to her prior sexual conduct with the defendant prior to that date or with anyone else under the Rape Shield law is not admissible.

(2)

Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DAN COVERT,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

DAVID L. ARMSTRONG
ATTORNEY GENERAL

DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KY 40601-3494
(502) 564-4049

COUNSEL FOR RESPONDENT

July 1986.

27pp

QUESTION PRESENTED

Whether the trial judge violated the petitioner's rights under the Sixth Amendment Confrontation Clause when, in a rape trial where consent was at issue, he excluded evidence of prior sexual relations between the petitioner and one of the alleged rape victims?

LIST OF PARTIES

Dan Covert

Commonwealth of Kentucky

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SUPREME COURT OF KENTUCKY

Respondent, the Commonwealth of Kentucky, respectfully urges the Court to deny certiorari for the following reasons.

OPINION BELOW

The unreported Opinion of the Supreme Court of Kentucky is reproduced in the appendix to Petitioner's Brief.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on October 31, 1985. Rehearing was denied on February 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is hereby accepted, subject to the additional facts detailed hereinafter.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE WHICH PETITIONER RAISES HERE WAS NEVER PRESENTED TO THE STATE APPELLATE COURT FOR REVIEW.

In Smith v. Murray, ___U.S.___. 54 U.S.L.W. 4833 (Decided June 26, 1986), this Court declined to address the merits of a claim which had not been presented for review by the Virginia Supreme Court on direct appeal of a capital sentence.

Here, Petitioner is seeking review of a claim which was preserved at trial but abandoned on direct appeal to the Kentucky Supreme Court. His argument,

that the exclusion of certain evidence violated the Sixth Amendment Confrontation Clause, has never been presented to a Kentucky court of review. The fact that the Kentucky Supreme Court allowed Petitioner to file two appellant's briefs, authored by different attorneys, suggests that such an omission was the product of professional judgment rather than oversight or incompetence. Listed in the appendix to this brief are the errors which were assigned below. Denial of Confrontation concerning Donna Wheeler is not among them, and at no point in the text of his briefs below is Kentucky's Rape Shield Statute even mentioned. The petition for writ of certiorari should be summarily dismissed. Hill v. California, 401 U.S. 797, 805, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484, 490-491 (1971).

II.

PETITIONER JUMPED BAIL PRIOR TO SEEKING CERTIORARI AND REMAINED AT LARGE UNTIL AFTERWARDS, WHEN HE WAS APPREHENDED BY AUTHORITIES IN GEORGIA.

The Kentucky trial court that sentenced Petitioner also granted him bail pending appeal.

After the Kentucky Supreme Court denied his petition to rehear the appeal, Petitioner was notified that he must appear before the trial court to show cause why service of sentence should not commence. Petitioner failed to appear for the February 28, 1986 hearing, which resulted in his $100,000 bond being forfeited. He remained a fugitive from justice until after his petition for writ of certiorari was filed, as shown by a June 26, 1986 letter from Petitioner's counsel to the Clerk of this Court.

In Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586, 588 (1970) the Court held:

> While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the court for determination of his claims.

Respondent respectfully submits that the recent capture of Petitioner should not exempt his petition from summary dismissal. Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975).

III.

THERE IS NO FACTUAL BASIS FOR PETITIONER'S CLAIM.

The appendix to Petitioner's brief purports to include a complete transcript of the in-chambers discussion and exclusion of evidence showing prior sexual relations between Petitioner and the prosecutrix, Donna Wheeler. At first blush, the trial court's ruling appears to violate the Confrontation Clause of the Sixth Amendment in addition to the Kentucky Rape Shield Statute, KRS 510.145(3).

Closer inspection of the trial record, however, discloses that the matter was resumed in chambers before Donna Wheeler testified on cross examination. Kentucky law requires that in order to preserve the exclusion of evidence for appellate review, the proponent must make an avowal of the evidence he otherwise would have introduced. RCr 9.52, Kentucky Rules of Criminal Procedure; Queen v. Commonwealth, Ky., 551 S.W.2d 239, 241 (1977).

Petitioner's counsel made an avowal immediately following the direct examination of Donna Wheeler before the jury. The transcript of Petitioner's avowal is reproduced in the appendix to this brief. As the Court will see, Petitioner offered no avowal testimony whatsoever as would suggest any relations, sexual or otherwise, occurring between himself and the prosecutrix prior to the July 28 attack alleged in the indictment. The only evidence offered concerning any prior sexual relations was that between Donna Wheeler and a Cincinnati Reds baseball player, as the occasion on which she had lost her virginity. The trial judge ruled that without identifying the baseball player, Petitioner could introduce evidence that the prosecutrix previously had lost her virginity.

The only other evidence Petitioner offered on avowal was that Donna Wheeler had engaged in sex with him after the July 28 incident, which the trial judge ruled was also admissible. KRS 510.145 does not address subsequent sexual activity, only prior conduct.

The avowal testimony that Donna Wheeler previously had dated a University of Kentucky basketball player, without having sexual relations, was clearly irrelevant and excluded accordingly.

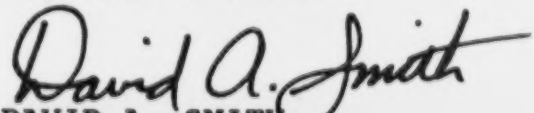
In short, Petitioner ultimately was permitted to introduce all the evidence he offered, save that concerning a nonsexual relationship between the prosecutrix and a college basketball player.

CONCLUSION

For all the reasons set out herein above the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL



DAVID A. SMITH
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FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 29th day of July, 1986, three copies of the foregoing Response to Petition for Writ of Certiorari were mailed first-class, postage prepaid, to Hon. Albert M. Pearson, III, School of Law, University of Georgia, Athens, Georgia 30602; and to Hon. Clifford H. Hardwick, Legal Arts Building, 6044 Norcross-Tucker Road, Norcross, Georgia 30093.

David A. Smith
Assistant Attorney General

APPENDIX

Kentucky
Fayette Circuit Court
Criminal Branch
Fourth Division
Transcript of Evidence and Proceedings
Trial, August 16, 1984

Pages 89-96

* * * * *

WHEREUPON the following was held in chambers outside the presence of the jury with Miss Donna Wheeler being present:

* * * * *

THE COURT: So you know what's going on, I previously made a ruling that certain evidence would not be admissible before the jury, but they have a right to get that evidence in to the record that they have offered for appeal purposes. In case I'm wrong and they reverse the case, they have an opportunity to put that in the record outside the presence of the jury. And that's what we're doing now.

MS. WHEELER: Yes, sir.

THE COURT: And you're still under oath. Okay.

* * * * *

BY MR. LUNDY:

Q. Miss Wheeler, do you recall the first day that you went to the apartment of Danny Covert's?

A. It was the first day that I met Mr. Covert.

Q. What date was that?

A. Approximately the 28th.

Q. Twenty-eighth.

A. Of July.

Q. 1983?

A. Yes, sir.

Q. Do you recall what day of the week it was?

A. No, sir, I know it was a weekday but not exactly the day.

Q. And you had told the Court here that that was the date that you were vomiting, throwing up and he had intercourse with you?

A. Yes, sir.

Q. Once or twice?

A. I think twice because it was when I woke up to --

Q. Now, did you go to his house on any other occasions?

A. I went to his house once after that.

Q. Okay. What date was that on?

A. Sir, it was --

Q. Well, how many days later?

A. Maybe five days later. He kept calling my apartment and --

Q. Now let me ask you this. During your conversations with him and first time you were in, had he indicated to you that he would give you $10,000 and also let you have a Ferrari automobile?

A. Yes, he did.

Q. That was worth about $85,000?

A. Yes, sir.

Q. Now, when you went back there the second time did you ask him for that $10,000 and tht 85 -- $85,000 Ferrari?

A. I didn't ask him.

Q. Did you discuss --

THE COURT: Hold it just a minute. All this would be admissible. I mean we're not putting in this by avowal because I ruled that all this is admissible and we're wasting time.

MR. LUNDY: Let me ask her a few more questions.

Q. Did you -- did you have intercourse with him or did he have intercourse with you the second time that you were there?

A. No, sir.

Q. Did he try to?

A. He wanted to. He asked me to -- he said that he would give me that money and give me a car that he already had the car and he told me that it was blue -- bluish white and he said that he already had purchased it and that he had to go to Chicago to get it. He said that -- he said I tell you what, I've already got it for you. And he said --

THE COURT: That's okay. All that's admissible. We're going to have to hear that in there.

Q. Let me ask you this. During the first time you went to his apartment did you tell him about how you had lost your virginity to someone who was a baseball player?

A. Baseball player.

MR. TURNER: Reds.

Q. Someone who played for the Reds?

A. Yes.

Q. You told him that?

A. (Witness nods head affirmatively) because he asked me if -- he asked me if I had ever had sex and I said just once and --

Q. Did you also tell him that you were - that you engaged in sexual activities with University of Kentucky basketball players?

A. No, I did not. I told him that I had dated a basketball player but that we had never had sexual activity.

Q. Did you tell him that you and this basketball player that you only engaged in oral sex because he respected you too much, you respected him too much?

A. No.

Q. You did not tell him that?

A. No, sir, I did not tell him that.

MR. LUNDY: Well, I guess, Judge, anything else I want to ask her probably confidential because what I'll ask her would be after July 18. I'm -- I assume that under your ruling I can ask her about any other times they -- he may have said that they had intercourse.

THE COURT: After this happened, I would think so.

MR. LUNDY: After the 28th.

MR. BOUVIER: I have no problem with that. It's only I don't want this -- looks to me like it's turning into a vast way of saying after the fact did he tell you before the fact that he had sex with Reds ballplayer.

THE COURT: I'm not saying that's admissible. I said that wasn't admissible.

MR. LUNDY: That's --

THE COURT: That's not admissible, basketball player is not admissible, but any contact she had with Covert after this incident happened is admissible.

MS. WHEELER: I did not have sexual intercourse with him after this happened.

THE COURT: He can ask you that in front of jury, but he can't ask you in front of jury about the basketball player or the baseball player, okay.

MR. LUNDY: Judge, let me get a clarification on another thing here. Would it be permissible for me to simply ask her to relate the conversation that which she's told, kind of conversation she had with Covert the night that she was there? Can I go into these things about whether or not he asked her if she had sex before, if she lost her virginity and not prove it, you know,

extraneous, but just as a part of conversation he had with him - she had with him? Now bringing somebody in and saying she left about five years ago, a week is one thing.

THE COURT: I think you can ask if he asked her if she'd loss her virginity but not go any further than that.

MR. LUNDY: Which baseball player.

MR. TURNER: Without losing virginity did you all talk about sex while you were there.

THE COURT: Something like that -- like that would be admissible. That's not a prior sexual act.

MR. TURNER: Judge, the basketball players came afterwards.

THE COURT: Well, I'm not going to allow that.

MR. TURNER: Might be interesting.

MR. BOUVIER: I have no objection to the question he just said did you all talk

about sex, but if he -- again if it's to be used as a lever to get back at which you said.

THE COURT: If she, if for instance, I think I can -- he can ask her did you tell him when you lost your virginity or --

MR. LUNDY: That's basically what I want to ask her.

THE COURT: Or if you lost your virginity, did you all have that conversation. I think he can ask her that.

MR. BOUVIER: Can I say one thing while we're here? I don't know if it'll come up or not but with Mr. Covert's anything's possible. This morning when I arrived I had several witnesses out here who I hadn't seen in six months and wouldn't immediately recognize because I only talked to them on the phone. I was looking for the people in the hall, and I saw too young women who I did not immediately recognize although they

looked familiar. I went up to them and said are you witnesses supoenaed in this case. And they both said no, we're jurors. They didn't have their juror buttons on at the time. I said sorry and backed away and said nothing else. But Mr. Covert was nearby and was, you know, glaring at me and I assumed that, you know, it may come up at some time.

MR. LUNDY: He never said to me about it. I make no point --

MR. TURNER: He told me about it and I said forget it, that happens.

* * * * *

WHEREUPON this concludes the session held in chambers at this time.

* * * * *

THE COURT: Okay, counsel for Mr. Covert may cross-examine.

MR. LUNDY: Thank you, Your Honor.

* * * * *

ERRORS ASSIGNED TO THE KENTUCKY SUPREME COURT

Appellant's Brief
Honorable John S. Turner,
Attorney at Law.

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED THE APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE SOLICITATION TO PROSTITUTION CHARGES SINCE THE COMMONWEALTH FAILED TO ESTABLISH VENUE.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE APPELLANT'S CONVICTION FOR RAPE IN THE FIRST DEGREE WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

III.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE APPELLANT'S CONVICTION FOR RAPE IN THE THIRD DEGREE AND SODOMY IN THE THIRD DEGREE, OF LISA ROBERTS, WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

* * * * *

Appellant's Supplemental Brief
Honorable David M. Andrews,
Honorable Margaret H. Kannensohn
Attorneys at Law

I.
THE TRIAL COURT SHOULD HAVE SUSTAINED COVERT'S MOTION FOR A DIRECTED VERDICT ON RAPE FIRST.

II.
COVERT WAS PREJUDICED BY THE REFUSAL TO SEVER THE THIRTY-ONE CHARGES.

III.
AS AN AGENT OF THE COMMONWEALTH THE EVIDENCE PATRICIA CRUTCHER OBTAINED WAS INADMISSIBLE.

IV.
COVERT'S RIGHT OF CONFRONTATION WAS DENIED BECAUSE THE COURT DID NOT SUPPRESS THE SUITCASE WHEN PATRICIA CRUTCHER TOOK THE FIFTH AMENDMENT.

V.
THE CUMULATIVE EFFECT OF THESE ERRORS DENIED COVERT HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

VI.
THE EVIDENCE AS TO THE MENTAL INCAPACITY OF LISA ROBERTS WAS INSUFFICIENT AND THE TRIAL COURT ERRED BY NOT DIRECTING A VERDICT OF ACQUITTAL AS TO RAPE THIRD AND SODOMY THIRD.

VII.

SEXUAL MISCONDUCT IS NOT A LESSER INCLUDED OF RAPE AND SODOMY.

VIII.

THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT OF ACQUITTAL ON ALL COUNTS OF SOLICITATION OF PROSTITUTION FOR FAILURE OF PROOF AS TO VENUE.

IX.

THE COMMONWEALTH FAILED TO PROVE THE MISDEMEANDOR OFFENSES OCCURRED WITHIN THE STATUTE OF LIMITATIONS.

X.

THE TRIAL COURT ERRED BY OVERRULING DEFENSE MOTIONS FOR FAILURE TO IDENTIFY THE DEFENDANT ON TRIAL.